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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Ex Parte THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, *Petitioner*

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its Review and Determination, the case of the Mutual Life Insurance Company of New York, Plaintiff in Error.

vs.

ELIZEBETH MAUD HILL, GEORGE E. HILL, by his Guardian, EBEN SMITH, et al.
Respondent.

BRIEF OF RESPONDENT.

S. WARBURTON,
Attorney for Respondent.

HAROLD PRESTON
EBEN SMITH
Of Counsel.

P. A. BECK & CO., PRINTERS.

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Ex Parte, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
a corporation, Petitioner.

Petition for Writ of Certiorari.

The petitioner does not pretend to say or to show that there is any question of public importance or of treaty rights involved in the decision of the lower court. It simply claims that the lower court committed an error in deciding the case against it. In fact it would be impossible for petitioner to show that there was any question of public importance, etc., involved in the decision of the lower court. I think no case can be found where there are fewer questions of public importance involved than in this case. The law of this case has been settled by a former decision of the Circuit Court of Appeals, together with the decisions of the United States Supreme Court in the cases of

The Mutual Life Insurance Company vs. Phinney, 178 U. S., 327.

The Mutual Life Insurance Company vs. Sears, 178 U. S., 345.

The Mutual Life Insurance Company vs. Hill, 178 U. S., 347.

The Mutual Life Insurance Company vs. Allen, 178 U. S., 351.

The Mutual Life Insurance Company vs. Cohen, 179 U. S., 362.

Every question raised or urged before the Circuit Court of Appeals on its second hearing, was urged in the former case and cases. Every question now raised was fully presented and argued before this Court on the former hearing of this case, together with the cases above cited. All these cases were argued at practically the same time, and while there are different decisions, they are practically the same decision, because every question urged in the one case was urged and argued in the other.

In addition to this it will be remembered that in 1897 the legislature amended the law of New York so as to apply only to cases where the assured or assignee had a P. O. address in New York. No case is liable to arise where there is a diversity of citizenship so as to give this Court jurisdiction. In addition to this the Supreme Court of New York recently decided a case which settles many questions as to the proper construction of the Statute of New York.

In call the Court's particular attention to the case of Strauss vs. Insurance Company, 67 N. Y. S., 509, which decision was affirmed in 70 N. Y. S., 1149. It will be necessary to read the decision in 67 N. Y., 8, to get a full statement of the facts. This case was affirmed recently by the New York Appellate Court, 63 N. E., 347.

We will discuss the various points raised by petitioner under the following heads and will give the page where the discussion will be found:

STATEMENT OF CASE.

I.

The decision of the Circuit Court of Appeals on the first hearing of the case was the law of the case on the second hearing in so far as it was not reversed or criticized by the decision of this Court. Page ..9...

II.

This Court held in the Cohen case that provision in a contract which clearly showed an intent to make the contract subject to the laws of another state was binding. The Hill contract contains such a clause. Page ..15..

III.

The insurance company was estopped and is estopped from claiming or showing or attempting to show that the contract was not actually made in New York. It was not competent for them to show that the contract was made in a place other than the agreed one in the contract. Page ..24

IV.

The acts, declarations, statements or agreements on the part of the assured are not binding on the beneficiaries. Page 28...

V.

Where parties to a cotnract make the place of contract

in a state different from that of the place where the contract is delivered, they cannot by an agreement in the contract waive a public policy statute of such state. P. 36

VI.

The contention that the statute of New York of 1877 applies to only one default is not well taken. Page ..45..

VII.

This action is not in the nature of a specific performance where parties have failed to meet the obligations of the contract. No premium was due until the statutory notice was served. This is the decision of every Court that has passed upon this question. Page..50..

STATEMENT OF THE CASE.

This action is based upon a policy of insurance, issued by the petitioner to the plaintiff in error on the life of George Dana Hill, payable to his wife, and in case of here prior death, then to their children. The complaint alleged the issuance and delivery of the policy, together with plea of performance. Petitioner answered alleging in the defense the non-payment of the premium, and that the insured, George Dana Hill had neglected and refused to pay the premiums, and that he and the Company had agreed to abandon and terminate the contract, also that the beneficiaries had likewise neglected and refused to pay the premiums.

The defendants in erro r interposed a demurrer on the ground that the policy was a New York contract, and that the Insurance Company had not alleged that they had

served a statutory notice of New York on any of the alleged defaulted premiums; that the service of the statutory notice was a condition precedent to the collection of premiums, and the policy for that reason was a continuing and existing contract at the time of the death of Mr. Hill. The Lower Court sustained the demurrer, and the same was appealed to the Circuit Court of Appeals, which affirmed the judgment. The case was then removed to this Court on a writ of certiorari. This Court reversed the Circuit Court of Appeals and the Circuit Court, on the ground that the pleadings showed that George Dana Hill and the Company had agreed to terminate the contract, *and that the beneficiaries had failed and neglected and refused to pay the second premium.*

See Insurance Company vs. Hill, 178 U. S., 347.

It will be remembered that there was a cluster of cases in which the complaints were similar, and the defences similar, all triel before this Court as practically the same case. See cluster of cases *supra.* This case was decided in this Court on the same day that the Phinney case was decided in which case the Court held it was competent for the parties to the contract to terminate it without the service of the statutory notice of New York, by an agreement made between them on a day subsequent to the due date of the premium, where it clearly appeared that it was the intention of the parties to do so. When the case reached the Lower Court, petitioner amended its answer but set up no defense not made in their former answer. Plaintiff denied the allegation in reference to the beneficiaries and the termination of the contract by agreement between them. The petitioner wholly failed to prove any

of the allegations of its answer in refernce to an abandonment or rescission of the contract.

It was claimed before the Lower Court and is claimed here in their petition that the declarations, statements and agreements of George Dana Hill, father of respondents, was binding on the beneficiaries. They showed by their evidence that they made a requst of Mr. Hill to pay the premium and that he neglected to pay it. This fairly states all the evidence on the question of abandonment. The record is equally clear that the Company made no such demand on any of respondents, who at that time were minors, or upon their guardian, Eben Smith, and it clearly appears that neither Eben Smith, their guardian nor any of the children had any knowledge of the non-payment of any premium. It admitted that the Company never ser- nor attempted to serve the notice, required by the statute of New York.

The language of the Cohen case, "that there was no suggestion of a recision, abandonment or knowledge by the beneficiary of the non-payment of the premium or any refusal or failure on her part in respect to the policy and that if the policy was a New York contract then the plaintiff was entitled to recover," applies with equal force here.

Respondents contend: 1. That the contract in question is a New York contract made so by the express terms of the contract for it is stipulated "that this contract of insurance when made shall be held and construed at all times and places to have been made in New York."

By a preceding provision of the application it makes the assent of the assured to the above clause a condition precedent to its accepting or entertaining the claims.

2. That the declarations and statements of Mr. Hill are not binding upon the beneficiaries.

3. That the clause in the policy attempting to waive the notice required by the New York law is ineffectual. The Supreme Court of New York in a recent decision said in reference to a note given in payment of a premium overdue, which note provided that a failure to pay the note *without notice* to any party or parties interested therein the policy should be null and void, was ineffectual. It uses this language, "It, (the note), has to be coupled with a like condition to the policy itself. That the policy shall be null and void on failure to pay any premium or note given therefor on the day it becomes due and can be given no greater force. The statute limits the provision of such agreement of forfeiture so that they can only take effect after the statutory notice is given." This case was affirmed in the New York Court of Appeals, 63 N. E., 347.

Strauss v. Ins Co. 67 N. Y. L. 509

The petitioners contest the position taken by respondent and claim that the Court held contrary to us on the former decision of this case together with the cluster of cases heretofore mentioned. There are but three decisions rendered in this cluster of cases, the Phinney, Hill and Cohen cases.

PHINNEY CASE.

The Court held in this case after first referring to the fact that there was involved a primary question as to whether the contract subjected itself in express terms to the operation of the New York law and whether the notice law of New Yory was in effect an amendment or the charter of the Company

Held—That where the insured himself was the beneficiary, his statement that he would not pay the premium when requested to do so by the Company, and his refusal to pay it, would amount to a termination or abandonment of the contract. It mentioned the fact that it had not overlooked he question whether or not in a contract with a Mutual Insurance Company a party could recover where there had been successive defaults but did not decide it.

HILL CASE.

This Court held in the Hill case that the allegation that plaintiffs (beneficiaries), had neglected and refused to pay the premium amounted to an allegation of demand on the beneficiaries on the part of the Insurance Company for the premium. That if the Insurance Company showed such a demand and refusal on the part of the beneficiaries to pay, it would make a good defense. It also sugge[illegible] that the question was raised whether or not the declarations of the insured would be binding upon the beneficiaries. It said it was an interesting question, but did not find it necessary to decide it.

COHEN CASE.

In the Cohen case the Court did decide every question left open in both the Phinney and Hill cases. This Court held:

1. That a clause in an application providing "it was made subject to the charter of the Company and the laws of New York," referred to the application only, but did not make the contract a New York contract.

2. That the statute was not an amendment of the charter of the Company.

3. That a clause in a contract similar to the one in this case did make it a New York contract.

4. That the statements and declarations of the insured did not bind a beneficiary.

It held against every other claim of petitioners then made or now made in the following way. So this court having held in the Cohen case that where a contract provided that "it was a contract made and to be executed in New York in the State of New York and to be construed according to the lafs of that state," it made it a New York, and this Hill contract providing that, "it should be held and construed at all times to have been made in New York" and further provided that, "it was made subject to the charter of the Company and the laws of New York," the decision of this Court sustains our contention that the Hill contract was a New York, and when we further mentioned that this court held affirmatively or negatively that, if such a contract was a New York contract then the notice law could not be waived, that declarations of the insured would not be binding on the beneficiary and against all other contentions of petitioner now urged, as we have shown and will more clearly show, we must come to the conclusion that the Circuit Court of Appeals was right when it said the decision of this Court upon all other points in the case not being criticised or reversed is the law of the case for this Court, we will now discuss the several points raised by petitioner in petition and brief.

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT ITS FORMER DECISION WAS

BINDING UPON IT AS THE LAW OF THE CASE IN SO FAR AS ITS FORMER DECISION WAS NOT REVERSED OF CRITICISED BY THIS COURT.

It is well established by all the authorities that the decision of an Appellate Court on a former appeal is binding on the same Court on a second appeal as the law of the case. This rule is as applicable to the Circuit Court of Appeals of the United States as they are Appellate Courts within the meaning of the rule. It has been so decided by nearly all, if not all, the various Courts of Appeal. This rule must apply in all cases in those Courts except in a case which is removed to the Supreme Court of the United States by one of the various recognized methods. In such an event, all points directly and necessarily decided adversely to the appellant by a Circuit Court of Appeals must remain the law of the case except in so far as reversed by the United States Supreme Court.

The fact that this Court takes a case by writ of certiorari and disagrees with a Circuit Court of Appeals on one of a dozen points raised in both Courts cannot change the rule as to the other eleven points decided by the Circuit Court of Appeals, which are not criticised or adversely commented upon. The fact that this Court reversed the Court of Appeals on one of a dozen points cannot open the case on the other eleven points not decided or commented upon. This seems to be conclusively the correct rule when it is remembered that it must necessarily be assumed by this Court and by all the litigants that the case is going back to the Circuit Court on the combined decision of the Circuit Court of Appeals and this Court, the decision of the Circuit Court of Ap-

peals being binding on the Circuit Court except as modified by the Supreme Court. Great force is added to this contention when it is remembered that it is only in rare instances and in cases of great public importance that this Court takes jurisdiction by writs of certiorari when, as in this case, the jurisdiction of the lower Court depends on the diversity of citizenship of the parties. It must also be assumed that the Supreme Court taking jurisdiction in such cases will decide every such important question which alone gave it the right to take jurisdiction at all.

More than this, this Court would expect and presume that a Circuit Court of Appeals would adhere to its rule and decision on a second trial which it had decided on a former hearing, after mature and careful consideration, to be good law, unless it clearly reversed it. This being true, this Court would in all cases where it exercises its discretion in that class of exceptional cases, decide every point in which it differed with the Circuit Court and the Circuit Court of Appeals, so that the Circuit Court and Circuit Court of Appeals could not fail to decide the case correctly and avoid the necessity of its again using its exceptional writ.

It certainly would be of great advantage to both the litigants and to the lower Courts, it being of such importance to all. We believe this rule to be correct in principle and also in the actual practice of this court.

It is the desire of all Courts to end litigation as early as possible, both for its own benefit and for the benefit of the litigants, in order that the expense of the litigants may cease and the party in the right may reap the benefits of the litigation and end his vexatious troubles.

We understand it is the practice of Appellate Courts in reviewing a decision of an inferior Court to always decide every question in the case with which it disagrees with the Lower Court, in order that the Lower Court may again try the case correctly. This is the basis of the rule of the law of the case. Most Courts go to the extent of holding that not only the points decided adversely to the appellant become the law of the case, but that every point that could have been properly raised and not raised on the first appeal must be held to have been waived by the appellant.

The Civil Court of Appeals of Illinois, 38th Appellate Court Reports, Ill., page 55, holds that it is an Appellate Court within the meaning of the rule, and held that its decision on a former hearing from which an appeal had been taken to the Supreme Court, and by it reversed, was still the law of the case on the second appeal on those points that the Supreme Court did not criticise or suggest were erroneous. This decision is of much importance in this, that the Court of Appeals of Illinois is not in most cases a Court of last resort, but each party has a right to appeal from its decisions to the Supreme Court in the majority of cases decided by it. Its language is as follows:

"It will not be necessary for us to make any further statement of the case or the facts therein than will be found in our former opinion, except only so far as there hase been some little change of the facts and status of the case. The questions as to the sufficiency of the allegations of the petition and of the contract were passed on by this Court when the case was formely here, and when the case went to the Supreme Court no objection was found to that part of the opinion, and, as far as this Court is concerned, these questions are res adjudicata, and we will refer to our former opinion for our decision on those points."

The Circuit Court of Appeals, 101 Fed. Rep., 198, Fifth Circuit, states the rule as follows:

"'It is a well established doctrine in the federal Courts at least that a second writ of error or a second appeal in the same case only brings up for review proceedings of the Trial Court subsequent to the mandate, and that it does not authorize a reconsideration of any question, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same. This doctrine results from the fact that a judgement rendered by an Appellate Court in a given case is conclusive on the parties thereto, and that an Appellate Court, like a nisi prius Court, is powerless to review or revise its own judgments after the lapse of a term at which they were rendered, except in cases of fraud. Another form of stating the doctrine is that propositions of law which were considered and decided on the first appeal become the law of that particular case, and, whether right or wrong, must be adhered to on a second appeal.'"

This Court has held in numerous decisions that on second appeal every question decided on the former appeal becomes the law of the case and is no longer open for furthr review by this Court. It was said in the case of Supervisors vs. Kennicott, 94th U. S., 498, that, "It is settled in this Court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for examination only, the proceedings of the Circuit Court, after the mandate of this court."

Matters necessarily involved in the determination of a question on appeal are settled by the decision when the same are gain presented on a subsequent appeal.

So the decision upon a prior appeal where the question presented on a second appeal was necessarily involved

in the prior decision.

Hutchinson vs. Chicago & N. W. R. Co., 41 Wis., 541.
Downer vs. Cross, 2 Wis., 371.
Bangs vs. Strong, 4 N. Y., 315.
Headly vs. Challis, 15 Kan., 602.
Crockett vs. Gray, 31 Kan., 346.
National Park Bank vs. Hass, 49 N. Y. S., 772.
Hollowbush vs. McConnell, 12 Ill., 203.
Eversdon vs. Mayhew, 85 Cal., 1.

The Seventh Circuit Court of Appeals in the case of Supreme Lodge vs. Lloyd, 107 Fed., p. 70, states the rule in this way:

"Upon an exception to the refusal of the Court to give a special instruction, we are asked to review the ruling, and authorities are cited which it is contended demonstrate right of the order under such a contract to adopt by-laws which shall exempt it from liability though the death result from a pre-existing cause. * * * If the cases cited had been brought to our attention upon a petition for a rehearing, we could have given these decisions their just weight, but now it is too late to consider them. The ruling made became, for this Court and the Circuit Court at least, the law of the case. If error was committed, it can be corrected in the case, if at all, only by the Supreme Court."

The Fifth Circuit Court of Appeals in considering a case on a second appeal where it seemed in doubt whether its former decision was in conformity to a decision of the United States Supreme Court says: "But it is not necessary to further alaborate this question, as it is res adjudicata in this Court."

The Court of Appeals of Kentucky (Penticost vs.

Ins. Co., 61 S. W., 29), states the rule in this language:

"We have on this appeal the identical case which was decided on the former appeal. Every point suggested and every argument now made could have been made at that time; and under a rule of long standing in this Court the law as announced in that opinion is the law of this case. For the reasons indicated, the judgment is affirmed."

II.

THIS COURT HELD IN THE COHEN CASE THAT A PROVISION IN A CONTRACT WHICH CLEARLY SHOWED AN INTENT TO MAKE THE CONTRACT SUBJECT TO THE LAWS OF ANOTHER STATE, WAS BINDING.

I do not see how it can be fairly contended that this Court held contrary to the decision of the Circuit Court of Appeals on the question of the place of contract. In fact, the decision of this Court in the Cohen case clearly sustains our view. The application in the Hill policy contained the agreement that "it was made subject to the charter of the Company and the laws of New York." This is the identical provision in the Cohen case, and if this were all there was in the Hill contract tending to show it was the intention of the parties to make it a New York contract, we would admit that the Cohen case was against us on this point. But this is not all. Immediately preceding the clause containing the contractual part of the application is this clause:

"The following declaration and agreement must be

signed by the person whose life is proposed for insurance."

This clause singles out and makes prominent the matter following it. It clearly appears from this that the matter following it was deemed by the Company as of the greatest importance. The Company makes the provision following a condition precedent to its accepting or considering the application. This is, in part, the provision referred to:

"It is agreed that there shall be no contract of insurance until the policy shall have been issued and delivered by the said Company and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application, *and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York.*"

This is the very meat of the contract. This is the application prepared by the Company for its prospective policy holders. It thus carefully provides when and at what time in the history of the negotiations the contract shall take effect, but at the same time it clearly and explicitly provides that, no matter when or where it takes effect, it shall take effect as if actually made and delivered in the city of New York.

I ask, in all fairness, what language the Company could have used which would more clearly and explicitly show the intent on the part of the Company to subject the contract to the laws of New York? This Court, in the Cohen case, 178 U. S., 262, while holding that a provision in the applica'ion was that "it was made subject to the charter of the Company and the laws of New York,," did

not make the policy issued upon such application a New York contract, but shows intent to make the application only subject to the laws of New York. It says:

"The provision referred to and which is stated at length in the succeeding part of this section, is one for a notice of a special kind, and to be given in a particular way. * * * * * Undoubtedly a foreign insurance company, making a contract within the state of New York, would find the contract burdened by its provisions. * * * * * It is not doubted that a contract by an insurance company of New York executed elsewhere may be its terms incorporate the laws of New York, and make its provisions controlling upon both the insured and the insurer. And it is argued that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is subject to the charter of such company and the laws of said state. * * * But that is very different from a provision that the contract issued upon such application should also be in all respects controlled by the laws of New York. * * * The stipulation in this policy is different from that presented in the Court of Appeals of New York in Baxter vs. Brooklyn L. Ins. Co., 119 N. Y., 450, 7 L. R. A., 293, 23 N. E., 1048, which was that 'it was a contract made and to be executed in the state of New York, and construed only according to the laws of that state.' There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms."

It cannot be doubted that this Court means in this decision that a contract containing such a provision in its policy would make it a New York contract. To us it seems as clear as day that not only has this Court failed to criticise the Circuit Court of Appeals on this point, but that in the Cohen case it clearly and affirmatively holds that this provision would make this policy a New York contract. What other possible meaning could the Company intend that the above provision and agreement should have? If it does not mean that the contract should be deemed to

have been written, signed and delivered in New York and controlled by the laws of New York, it certainly does not mean anything. It does not mean that it should be deemed that the contract was prepared and signed in New York, because these two things do not determine the place of contract or determine anything at all in relation to the contract so far as the rights of the parties are concerned.

This provision should be construed in the light of what the parties would actually mean and understand by inserting such a provision in the contract. How would Mr. Hill and the beneficiaries understand it? Can there be any doubt that the insured would so understand this provision? If there was any provision in the New York law to the benefit and advantage of the Insurance Company in this case, would it not be claiming that by this agreement they made their policy a New York contract? If there is any doubt about the meaning of this provision, then it must be resolved in favor of the insured.

If it is competent for the parties to stipulate that the contract of insurance should be controlled by the laws of New York, then it is competent for them to agree as a fact, a fact which if proved, would make it a Ne work contract, and certainly the parties would adopt language most appropriate to express that intent. It must not be forgotten that this agreement was made at a time when it was in the power of the contracting parties to have the contract actually made in the state of New York. The Company could have required the premium to accompany the application, then accept the application, issue the policy, and mail it in New York, direct to Mrs. Mill, or hold the policy when issued until it received the premium in New York, and then

mail the policy to Mrs. Hill, or Mrs. Hill could have required the delivery of the policy to her by mail from New York, upon her paying the premium in New York. Under such circumstances, no one would claim that the policy was not a New York contract.

This not being convenient, the parties did what it was competent for them to do—agreed that the contract when made should be held and construed at all times and places to have been made in New York. This Court, in the Cohen case, said:

"While the contract is based upon the application yet the latter is only a preliminary instrument, approved on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the state is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. * * * * * But that is very different from a provision that the contract, issued upon such application should also be in all respects controlled by the laws of New York."

The provision here, it will be noticed, meets the suggestion that it was not the application but the contract when made, which should be construed at all times and places to have been made in New York.

The words "contract when made," as used in the application, mean a contract when signed and sealed and delivered and everything done necessary to be done in order to make it a complete and binding contract on all parties.

Mr. Anderson in his law dictionary defines the word "make," of which "made" is past tense, as follows:

"To sign, seal and deliver; to execute as, to make a deed, bill, note. The maker of a note is one who has executed and delivered the note."

When we speak of one who has made an assignment, we mean an assignment that has been executed and delivered. Mr. Abbott in his law dictionary defines "make" as follows:

"To make a contract is to agree, or if a written contract is contemplated to execute the paper with the requisite formalities and usually to deliver it as binding."

"Make" spoken of in writing inter partes usually implies delivery; ordinarily the expression, made a note, imports that it was not only signed but delivered as an obligation. The instrument has no inception when the subscriber retains it for future disposal. "An averment in a declaration of complaint of the making of a promissory note includes delivery to the payee. Chapell vs. Bissell, 10 How. p. 274. 2 Cowen 536. An averment that defendant made the note in suit is equivalent to saying that he signed it and delivered it to the payee. Sawyer vs. Warner, 15 Barb., 282. To the same effect is Woodruff vs. Dorwin, 3 Vt., 82, 5 Vt., 500. Also Gould on Pleading, 821. Chitty on Pleading, 257."

Several courts have passed upon policies using the identical language of this contract, and have uniformly he held that such language would designate the place of contract, and make the laws of such state a part of the contract, and that a provision in such policy, attempting to waive a public policy statute in force in the state of the agreed place of contract, is void, and of no eeffet. We will quote from some of them on the question of place of contract.

"The policy of insurance provided that it was accepted upon the further conditions and aggreements contained on the following page which are made a part of this contract *and which contract shall be held and construed to have been made in the City of Cincinnati, Ohio.* The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had a right to

rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect. Bank vs. Rickman, 16 Grat., 126, 127; Corbin vs. Bank, 87 Va., 665, 13 S. E. 98; 3 Minor Inst., 145; Story, Conf. Laws, Secs. 263,280.

Union Central Life Insurance Company vs. Pollard, 26 S. E., 421.

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and the secretary of the company, in the City of New York. The premium was made payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the City of New York. *It was expressly agreed that the policy should be construed to have been made in the State of New York.* It was therefore a New York contract, and it is to be governed by the laws of that state. Richards, Ins., 44."

Goodwin vs. Ins. Co., (Iowa) 66 N. W., 157, p. 160.

There can be no doubt that this policy is to be construed according to the law of Pennsylvania.' It is expressly provided in the application, which is made part of the policy, that '*the place of contract shall be the City of Philadelphia, State of Pennsylvania.*' In Weyman vs. Southard, 10 Wheat., 1-48. Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' See Pritchard vs. Norton, 106 U. S., 124,136, 1 Supt. Ct. 102, and cases there cited. In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. vs. Savings Bank, 72 Fed., 413 on p. 418.

"It was also stipulated that the *said contract should be construed and governed by the laws of the State of*

New York. The Court held that under that provision the contract was dominated by the notice law of New York."

Johnson vs. Ins. Co., 78 N. W., 905.

"Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statue of the state where they were made and to be performed, explicitly provided that a policy for the benefit of a married woman shall enure to her separate use or that of her children; but if the annual premium exceed three hundred dollars, the amount of such excess shall enure to the benefit of the creditors of the person paying the premiums.

"The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

Bank of Washington vs. Hume, 128 U. S., 195.

...."*This policy is a contract made and to be executed in the state of New York,* and shall be construed only according to the character of the company and the laws of that state." From which is clearly appears that it was the intent of the parties to locate the place of its execution in the State of New York. Especially does this appear to have been the intention of the defendant. The provision above quoted appears as a part of the printed form of the policy issued by the company. It could have been inserted therein only after full consideration, and its insertion could have had but one object, and that was to bring the policy as fully within the terms of the State of New York as though it had been actually executed and delivered therein. This was done for the benefit of the Company, and it must abide the results flowing therefrom. In our opinion sufficient appears upon the face of the policy to require us to construe it as though it had been actually executed and delivered in the State of New York. It must follow that the statute in question must be given force in determining rights founded thereon."

Gnesemere vs. Ins. Co., 10 Wash., 202.

The Supreme Court of Missouri in the case of Cravens vs. the New York Life Insurance Company, 50 Southwestern 519, uses this language:

"The rule to be deduced from the authorities seems to be that, when no statute intervenes prohibiting it, a corporation doing business by permission of another state from that of its corporation may by contract make the law of the state of its incorporation the applicatory law of the contract, but that, when the laws of the state in which it does business by license prohibits such corporations from making certain kinds of contracts, they can only act in accordance therewith."

In addition to this the Company is a New York corporation, with its principal place of business in New York City. It signed and executed the policy in the State of New York. The policy was prepared by the Company in New York, and it provided that the contract in every particular should be performed in New York. The policy was to be paid there—the proofs of death were to be delivered there—and the premiums were to be paid there. Justice Harlan in the case of Coghlan vs. the Railway Company, 142 U. S., page 101, says:

"The parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view of another country as the rule by which it is to be governed. Now, here the payment is to be in England; it is an English security and so intended by the parties.

Referring to these and many other cases, this Court, speaking of Justice Matthews, held, upon full consideration, in Pritchard vs. Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretations and validity of the contract depend, are either expressly or presumptively, incorporated into it as its obligations."

Again this Court in the case of London Assurance Co., vs. Companhia de Moagens De Barreiro, 167 U. S., 149 said:

"Under the circumstances we think that this contract of insurance is to be interpreted according to English law. The appellant is an English Company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be prerformed in English. * * * This is what the parties expressly stipulated for, and it is no injustice to the Company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the polciy of our own."

III.

THE PETITIONER, THE INSURANCE COMPANY, WAS ESTOPPED FROM CLAIMING OR ATTEMPTING TO SHOW THAT THE CONTRACT WAS NOT ACTUALLY MADE IN THE STATE OF NEW YORK. IT WAS NOT COMPETENT FOR THEM TO ATTEMPT TO PROVE THAT THE CONTRACT WAS MADE AT ANY PLACE OTHER THAN IN THE STATE OF NEW YORK, THE AGREED PLACE OF CONTRACT.

We do not see how it can be claimed that the parties did not intend by this agreement to make the place of contract in the state of New York. What other possible purpose can the provisions have or be intended to have. The company, in the printed form of the application, had already provided that the application should be subject to the charter of the Company and the laws of New York so it could not refer to the application alone, but clearly shows that it was intended to make the whole contract when com-

pleted subject to the laws of New York. It says: "The contract was made," this means when completed, when it becomes binding on all parties. "Shall be construed at all times and places to have been made in New York," means it shall be construed by all parties in Court and out of Court as a New York contract. It amounts to an agreed fact as to the place of contract upon which both parties shall act in consummating the contract. Suppose the attorneys in this case had submitted it to the Court upon an agreed statement of facts, one of which was that the contract was made in New York. Would not the Court be compelled to hold it a New York contract? Yet such an agreement should not have any more, nor as much, controlling effect as this agreement, because, based on this agreement, the Company bound itself to pay the beneficiary $20,000 at Mr. Hill's death, and on the part of Mrs. Hill to pay $814, or suffer forfeiture, to secure the covenants of the insurance company. The contract was finally made on the faith of this agreement as a basis of the contract at a time when neither party need go on with the consummation of the contract unless this provision was to have a binding effect and force. That such was the intention of the parties, at least, the Insurance Company at that time, cannot be doubted. A layman would so understand the language of the agreement. So would those skilled in the law because it is the language ordinarily used in speaking of the place of contract. Either party at the time this agreement was made could have required the delivery of the contract in New York, and thus made it a New York contract. Having made this agreement, it is fair to assume that both parties relied upon it in fixing the laws of New York as applicatory law and regarded it unimportant where the delivery

should actually take place. Bigelow on Estoppel, states the rule as follows:

"The first class of cases under the head of Estoppel by Contract, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or defendant, or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties, (it may be one, it may be all) pledging or justly assuming the act in question will be estopped from taking any position, to the detriment of other parties, inconsistent with the special fact, except for the purpose of reforming the language of a written contract and making it conform to the rule of this agreement. The rule may be illustrated by two or three examples. Thus dealing with a person that occupies a particular position or character, it may be as administrator, executor, trustee, director, agent, or holder of any manner of office, will estop that person, generally speaking, to deny the fact agreed or assumed in regard to his position or character. So a contract based upon one's having a certain title to property will estop the parties, or the party pledging the fact if it be the act of but one, in the performance of the contract, from claiming a different title. And so accepting and treating an article in shipment as baggage may estop owner and carrier from treating it as freight."

Bigelow vs. Estoppel, 5th Ed. 459.

"It is a sound rule of law that a written contract cannot be altered or varied by parol proof. This excellent rule of law is intended to guard against fraud and perjuries, and cannote be too steadily enforced and supported by Courts of Justice. * * * This rule prevails equally in a Court of Equity and a Court of law. Generally speaking, the rules of evidence are the same in both Courts, and if words of a contract be intelligible there is no instance

where parol proof has been permitted to give them a different sense. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, through fraud or mistake, it is made to speak a different language from what was intended, the estoppel does not apply. These are the only cases that form an exception to the rule. * * * Notwithstanding these matters, the parties to a deed or a contract may agree to bind themselves in this respect by stating a particular state of things as a part or basis of the grant or contract. And when this thing is done with sufficient clearness as to leave no doubt as to the intention, it falls within the general principles that matters which have been solemnly reduced to writing cannot be denied, and constitute an estoppal by deed.

Herman vs. Estoppal, p. 708, Sec. 575.

"That the doctrine of estoppal in pias is a most equitable doctrine and one without which the law of the country could not be satisfactorily administered."

"When a person makes to another the representation, 'I take upon myself to say such and such things do exist' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Herman on Estoppal, Sec. 1170.

Wharton on evidence states the same rule in this language:

"If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that, as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."

Id. Sec. 1039.

"We must, however, again emphasize, as bearing on both admissions of rights and admissions of facts, the radical distinction already noticed, between admissions which are contractual and dispositive, and such as are non-contractual and no-dispositive; in other words: between admissions made intentionally, for the purpose of transferring a right, and admissions made causally, for the purpose of narrating an incident, or explaining an alleged right. The contractual and dispositive admission is equivalent to an offer which, when accepted by the other party, makes a contract. Such an admission, as we will presently see, when made as the basis of contract cannot be revoked."

Id. Section 1083.

"In this view, a party making such a statement, thereby inducing another to enter into a contract with him, is bound to such other by such statement, whether it be true or false. A person, for instance, falsely claiming to be an agent, cannot dispute his statement when sued on it by a party acting on his pretension. A party warranting cannot escape liability by claiming that his warranty was false. Even an honest misstatement, by which the other contracting party is led to enter into a contract, binds the party by whom the misstatement is made."

Id. Section 1087.

"Hence where parties have knowingly agreed to act upon an assumed state of facts, their rights will be made to depend on such assumption and not upon the truth."

Id. Section 1146.

IV.

THE ACTS, DECLARATIONS, STATEMENTS OR AGREEMENTS ON THE PART OF THE INSURED CANNOT PREVAIL AGAINST THE BENEFICIARIES IN A POLICY OF LIFE INSURANCE.

The Circuit Court of Appeals on the first hearing of

this case held that the statements, declarations and agreements of Mr. Hill, relative to an abandonment of the contract, was not binding upon the beneficiaries. This point was urged by the petitioner at considerable length at the former hearing in this Court. This Court in its opinion made mention of this point, and said while it was a very interesting question it was not necessary to decide it.

In the Cohen case, as we will show, this Court held flatly against this claim on the part of the petitioner, and clearly sustained the Circuit Court of Appeals on this point. In order to fully realize how thoroughly this court held against the plaintiff in error on this point, it will be necessary to examine the pleadings in both cases in connection with the opinion in each case.

The following are the allegations in the Hill and Cohen cases, as they appeared in the records in these cases in this Court:

ALLEGATIONS AS TO MR. COHEN, INSURED, COHEN CASE:

And the said Alexander Cohen, on the 11th day of June, 1892, pal done-half of the annual premium due on said policy for the year beginning on the 11th day of June, all premiums due before that time having been paid, and thereafter wholly neglected, failed and refused to pay any other or further annual premiums ,or any part thereof, upon said policy, and that no payment whatever was made by or on behalf of said Alexander Cohen of any annual or semi-annual premium due upon the said policy, but the same was by him suffered to lapse and become forfeited.

See record former hearing, Cohen case.

ALLEGATIONS AS TO MR. HILL, INSURED. HILL CASE:

And the said Hill, being fully so informed and advised in the premises, refused to make payment of said premium, or any part thereof, and then and there intending and for the purpose of inducing said defendant to rely upon the same, informed the defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance; but, on the contrary, he, the said George Dana Hill, intended to allow said policy to lapse and become forfeited.

See record former hearing, Hill case.

ALLEGATIONS AS TO BENEFICIARIES, HILL CASE, DEFENDANTS IN ERROR:

And the said Ellen Kellogg

ALLEGATIONS AS TO MRS. COHEN, BENEFICIARY. COHEN CASE:

NONE.

See record former hearing, Cohen case.

Hill, his wife, during her lifetime, and each and all of the plaintiffs neglected and refused to pay the defendant the said sum, or any part thereof.

See record former hearing, Hill case.

1. This Court in the Hill case, decided six months before the decision in the Cohen case, held that the pleadings in reference to the refusal of the bneficiaries to pay the premium implied a personal demand upon them and made a good defense if proven, and that it was not necessary to decide whether the agreements, statements and declarations of Mr. Hill, the insured, would be binding on the beneficiary.

2. When this Court come to consider the Cohen case, it found no allegations of refusal on the part of Mrs. Cohen, the beneficiary; yet the allegations of the answer in reference to Mr. Cohen, the insured, were full stronger than those made against the Hill beneficiaries.

3. So if the declarations, statements and conduct of Mr. Cohen were binding on the beneficiary, Mrs. Cohen then the answer in the Cohen case was good and sufficient regardless of the question of the place of contract. But the Court found and held that the declarations of Mr. Cohen, the insured, were not binding on the beneficiary and did not establish a good defense as to the beneficiary.

This Court in the statement of the case, 179 U. S., 262, says:

"On November 9, 1898, this action was commenced in the Circuit Court of the United States for the District of Washington. The ingle defense was the non-payment of premiums after June 11, 1892. *There was no suggestion of rescission, abandonment, knowledge by the beneficiary*

of the non-payment of the premium, or any refusal or failure ON HER PART in respect to the policy."

In the opinion further on the Court says:

"The Mutual Life Insurance Company vs. Phinney, 178 U. S.,327, was an action against the same Insurance Company in the same district on a policy like the one in controversy here SAVE THAT IN THAT THE INSURED WAS HIMSELF THE BENEFICIARY."

It will be observed that the Court says that there was no suggestion of rescission, abandonment, knowledge by the *beneficiary,* no refusal on *her* part; but the Court will observe and we desire to repeat that the same answer had alleged that Mr. Cohen the insured, had wholly neglected, failed and refused to pay the premium; so if the statements and conduct and abandonment declared on the part of the insured, Mr. Cohen, were binding on the beneficiary, Mrs. Cohen, the plaintiff in error had plead a good defense and it would not have been necessary to consider any other point by the Supreme Court. But the Court says, there was no allegation against the beneficiary; no allegation as to her. Continuing the Court says in its opinion:

"The primary question noticed but not decided in those cases (the Phinney case) is distinctly and solely presented in this."

As we have said before, this means not that the primary question is the only one raised but the only one that made out a good defense for the Insurance Company. Every question now raised and urged so strenuously was likewise raised and urged strenuously in the Cohen case. Every question now raised was properly raised on the record in that case. The Court means by this language

that that primary question was the only question that could avail the Insurance Company. It means that and it cannot mean anything else. This will clearly appear by an examination of the brief in the Cohen case. Here is a synopsis of the points raised in the Cohen brief together with a citation to the particular part of the brief where discussed.

1. "The contract was abandoned by Cohen, and this he had a right to do." Cohen brief, page 89.

2. "The premium notice of New York never had any application to the Cohen policy. This statute did not apply to the business of collecting premiums outside of New York." Cohen brief, p. 12.

3. "The statute of 1877 applied to the business of collecting premiums within New York." Cohen brief, p. 13.

4. "The limitation of the scope of the acts of 1876 and 1877 and 1892 is consonant with the policy of the legislature manifested by the act of 1897." Cohen brief, p. 25.

5. "The Cohen policy is a Montana contract under the true doctrine of the conflict laws." Cohen brief, p. 28.

6. "It is submitted that equitable and true construction of the statute of New York is that the statute operated on the first default alone and did not preserve the contract forever under successive defaults." Cohen brief, p. 30.

7. "No notice was necessary because Cohen's post-office address was not in the state of New York." Cohen brief, p. 84.

8. "If the Court holds the true construction of the statutes of 1877 and 1892 required a notice to be sent Cohen unless waived, then it is claimed by the plaintiff in error that the sending of any statutory notice was waived by Cohen by the express terms of the policy." Cohen brief, p. 80.

9. "The alleged cause of action was not pleaded and

there was a departure. For argument on this point see Phinney brief point 7." Cohen brief, p. 89.

In fact the Insurance Company in their Phinney brief, which was filed in that case when before this Court, at page 143, admits that the declarations and statements of the insured are not binding upon the beneficiary.

"This might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith vs. Life Ins. Co., (101 Cal., at page 638), 'the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life, *payable to another*, the insured cannot surrender the policy without the consent of the beneficiary.' But if the beneficiary is the insured himself, as in the present case, his right to surrender does not depend on the consent of any one else."

The following are quotations from some of the decisions of the various Courts and text works on this point.

"It is not quite true that a failure of the wife to pay the premiums from year to year as they became due will work this result. The statute, unless waived in writing (the Court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1897), provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to the payment of premiums, as the original policy (chapter 347, Laws 1879). *And no policy can be declared or treated as lapsed or forfeited until* 30 *days after notice* to the policy holder."

Stokes vs. Ammerman, 121 N. Y., 323.

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest inured to the assured. *She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him.*"

Ins. Co. vs. Haney, 10 Kansas, 403, by Judge Brewer.

"In this case the insured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums it would not lapse, and valuable rights would still exist under it. Under the circumstances the insured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

Pingry vs. Insurance Company, 144 Mass., 381.

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo with-

out their consent, nor take from them what was already theirs and destroy the trust so far as executed."

Garner vs. Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

"The insured in such a case is not a party to the record, has no interest in the policy, *and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases* with its issuance, so that there is no legal ground upon which his statements can be received."

Grangers' Ins. Co. vs. Brown, 57 Miss., 308, 315.

"The offer of the defendants to prove the statements of Fish, made in the fall of 1853, in relation to his intemperate habits, was properly overruled. Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not in any manner the agent of the plaintiff, after the issuing of the policy, and so could not bind him."

Rawls vs. Ins. Co., 27 N. Y., 282, 290.

"The statements in question, then, are the declarations of a stranger, one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party. * * * They were not admissions against interest, for they could injuriously affect only his wife's separate property."

Fraternal M. L. I. Co. vs. Applegate, 7 Ohio St., 293, 279, 298.

"To the same effect is Mr. May's text on the same question:

'A life policy and the money to become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and

issue a new one, or by other act to transfer the interest to anyone else. This right cannot be affected by any acts of the assured subsequent to the issue of the policy, except it be a breach of the condition. * * * No admissions of the assured subsequent to the policy are admissible against the beneficiary.'

May on Insurance, 3d ed., 399, L.

"'While the beneficiary lives, no surrender of the policy without his consent, or non-payment of the premium after such surrender, will defeat his right. A surrender of the policy by the husband for the wife is ineffecutal without her authority. * * * and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums after such an attempted wrongful surrender, without notice to the beneficiaries, will not forfeit the policy."

May on Insurance, 3d ed., Sec. 399, P.

"And it is a general rule that a policy and the money that may become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and issue a new one, or by other act to transfer to any other person the interest of the person named.

Wash. Bank vs. Hume, 128 U. S., 195, p. 207.
Glanz vs. Gloeckler, 104 Ill., 573.
Gould vs. Emerson, 99 Mass., 155.
Wilburn vs. Wilburn, 83 Ind., 55.
Ricker vs. Ins. Co., 27 Minn., 193.
Ins. Co. vs. Smith, 44 Ohio St., 146.
Garner vs. Ins. Co., 110 N. Y., 266.
Pitcher vs. Ins. Co., 33 La., 322.
Bacon on Ins., Sec. 292.
May on Ins., Sec. 399, p. ..
Ins. Co. vs. Wilke, 47 S. W., 544.

V.

WHERE PARTIES TO A CONTRACT MAKE

THE PLACE OF CONTRACT IN A STATE DIFFERENT FROM THAT OF THE PLACE WHERE THE CONTRACT IS DELIVERED, THEY CANNOT BY INSERTING AN AGREEMENT IN THE CONTRACT WAIVE A PUBLIC POLICY STATUTE OF SUCH STATE.

It seems entirely unnecessary to discuss this question for the reason that every Court so far as we know when called upon to pass upon this question have held that such statute could not be waived. But what is more important still, is the fact that since the former hearing of this case, the New York Supreme Court has decided this question in our favor. In that case the insured had given his note in payment of a premium subsequent to the due date of it. The note contained a condition that the policy should be forfeited "without notice to any party or parties unless paid when due." The note was not paid when due and the Company insisted upon a forfeiture. The Court held that this attempted waiver of the service of a notice required by the statute was of no effect or force, stating: "The statute limits the operation of such agreement of forfeiture so that they can only take effect after the prescribed notice of forfeiture, it is prohibitory and cannot be evaded."

Strauss vs. Insurance Co., 67 N. Y. S., p. 509.

The opinion in the above case was affirmed in 70 N. Y. S., 1149, the Court saying: "Judgment affirmed with costs on the opinion of Justice Gaynor, 67 N. Y. S., 509. This case has been again affirmed in the recent decision by the New York Court of Appeals, 63 N. E., 347, the Court saying: "The only default on the part of the plaintiff

was a failure to pay a part of the premium on the due day and as the defendant had never served a statutory notice it was not in a position to work a forfeiture of the policy."

The court will observe that the extension of time in the payment of premium in the above case was made by an agreement in the note, that the policy should be forfeited if the note was not paid when due without any notice to any of the parties in interest. If such a waiver after the premium becomes due is not effectual, then it follows as clear as day that a waiver inserted in a policy at the time of the delivery and before it took effect would be of no effect or force.

It seems to us that petitioner can hardly fairly contend that this Court did not at least negatively hold against it on the former hearing on this point.

The defense that the statute of New York was waived by the express terms of the policy, was the only defense common to the whole cluster of cases argued at the same time, as the Hill case, to-wit, the Phinney case, the Hill case, the Sears case, the Cohen case and the Allen case. A decision on this point in favor of the Company, would have forever ended all those cases. Nothing would have been left in any of them for a new trial, nor would one ever have occurred. It was the only point common to them all, which was fatal to them all. As the Court left them, all were sent back to the Lower Court with the possibility of a new trial. If this point was well taken, the Court would not only have eneded the matter by deciding it in accordance with the prayer of the plaintiff in error, but would have avoided the burden to itself of going into the cases at great length, writing several opinions on dif-

ferent points, and deciding several important and difficult questions. It certainly would not have traveled this long and difficult route when it could have taken a short, sure and certain one that would have ended all the cases and all the trouble, both to the Lower Courts, this Court, and the litigants as well. If it did not decide this point affirmatively in favor of the plaintiff in error; yet, at least in a negative way, it did decide the point against it. The most that can possibly be claimed by the petitioner is that the Court left the decision of the Lower Court undisturbed, but we claim that it clearly appears by the decision in the Hill case and the Cohen case taken together that this Court decided this point in favor of the respondent, and against petitioner. The Cohen policy contained a clause identical with this, attempting to waive the statute of New York. The Court in the statement of the case by Justice Brewer, sets out in full this clause, which the plaintiff in error claims had this effect. (See statement of case 179 U. S., 262.)

We have before quoted a portion of the opinion that we now quote, but for the convenience of the Court set it out here.

"The primary question noticed but not decided in those cases, is clearly and solely presented in this."

"New York, on the other hand, the state by which the Insurance Company was chartered and in which it had its principal office, by Section 1 of Chapter 321 of 1877 had enacted——"

"The provision referred to, which is stated at length in the succeeding part of the section, is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S., 330, 44 L. Ed., 1089.

"This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover. The question, therefore, is whether the law of New York controls."

It surely means what it says, that if the policy was a New York contract the waiver clause was of no force of effect. It could not have decided the point more effectually against the contention of plaintiff in error if it had said: "The clause in the policy attempting to waive the statutory notice is of no effect if the policy is a New Yerk contract."

We have called the Court's attention to the fact that in the Cohen case this Court said: "The primary question noticed but not decided in this case (Phinney case) is distinctly and solely presented in this," did not mean that that was the only question raised in the case because this point we are now discussing was urged at length in the Cohen and Phinney briefs filed by plaintiff in error, devoting 28 pages in those briefs to this point alone. See Cohen brief, page 88, Phinney brief, page 116.

Each of the Courts from which the following cases are extracts fully support this ruling, as will more fully appear by an examination of the cases at length. But without discussing each case separately, we make the following quotations from them:

"The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had the right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect. Bank vs. Ruxkman, 16 Grat., 126, 127; Corbin vs. Bank, 97 Va., 665, 13 S. E., 98; 2 Minor Ins., 145; Story, Confi. Laws, 263, 280. * * * It is therefore as much a part of every contract of life insurance

governed by the laws of the State of Ohio, and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, and that no waiver of the particular stipulation in the contract can change the law. Hermany vs. Association, 151 Pa. St., 17; 24 Atl., 1064; Ins Assn. vs. Ficklin, 74 Md., 172, 21 Atl. 680, and 23 Atl. 197; Ins. Co. vs. Leslie, 47 Ohio St., 409; 24 N. E., 1072; and White vs. Society, 163 Mass., 108; 39 N. E., 771."

Ins. Co. vs. Pollard, 26 S. E., 421.

The insurance in the above case was effected in the state of Virginia. Between the Insurance Company's agent there, and the insured, who resided there. In the following case the party resided in Texas, where the contract was actually completed.

"We come, then, and consider the terms of the statute just as if they were literally printed in the policies as we are required to consider and construe any other written contract, except as it was proved by the statute law of New York. Its provisions are mandatory and cannot be waived by the contracting parties."

Ins. Co. vs. Orlopp, 61 S. W., 336.

"The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture. * * * In other words, the statute is to be entirely overthrown and set aside, and the Insurance Company, under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. * * * Neither can an agreement be valid which gives an effect to a warranty which is in defiance of the statute. The Legislature enacted a rule for the regulation of the

contracts of Insurance Companies, which is a matter of public interest and concern. The operation of the rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts, on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from the contract. * * * The contract of insurance must be made in subordination of the statute, and must have the legal effect which the statute attributes to it, and none other."

Insurance Co. vs. Ficklin, 74 Md., 172.

"Admit that Griffith attempted to waive all notice of non-payment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver—consent never gives jurisdiction not otherwise possessed of the subject matter to a Court, for the reason that it lacks the power to adjudicate such subject matter, except as conferred by law."

Mr. Griffith was a resident of California, where the contract was finally consumated.

Griffithvs. Ins. Co., 101 Cal., 627.

"It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid, as well as the insertion in theapplication of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

Clement vs. Ins. Co., 140 U. S., 226.

"The notice sent to the insured, in the present case, did not comply with this statutory provision. The de-

sign of the statute is apparent. A policy in a regular life company fixes both the time of payment of premium and the amount thereof; yet the same statute provides that no life insurance company can declare forfeiture or lapse any policy by reason of the non-payment of any premium without notice, and prescribes what such notice must contain. It further provides that in case the payment is made within the life of the notice it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

Warner vs. Association, 100 Mich., 158.

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that if any of the premiums were not paid when due the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1877 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture), applied, and a notice sent 15 days before the premium was due was insufficient."

Ins. Co. vs. Smith, 41 S. W., 680.

In this case Mr. Smith resided in Texas, where the insurance was effected and the contract finally consumated.

The foregoing authorities are directly in line with the general rule, as stated by Mr. Wharton on Conflict of Laws:

"To this statement, however, it may be objected that in cases where the law of the place of making the contract conflicts with the law of the place of performance, the validity of the contract, so far as concerns its perform-

ance, depends upon the law, not of the former, but the latter, place. It has hence been frequently held that a contract illegal by the law of the place of performance is illegal everywhere. On the other hand, an action may be maintained on a debt good where it is payable, though invalid by the local laws of the place where the contract is made. But the conflict of opinion in this respect is rather nominal than real."

The Court of Appeals of New York stated the proposition in these words:

"A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is performed, is illegal and void everywhere. Hyde vs. Goodnow, 3 N. Y., 266-269."

See Jewell vs. Wright, 30 N. Y., 259.

This decision, together with the decision in the case of Jewell vs. Wright, 30 N. Y., 259, supra, having been announced prior to the execution of this contract, was as much a part of the contract as the statute. The company knew that such would be the construction of the contract by the Courts of that state whenever it undertook to enforce the forfeiture provision of the policy in New York, where it alone could exact a forfeiture.

The Supreme Court of Missouri on the same question used this language:

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."

Bank of Louisville vs. Young, 37 Mo., 398.

In a case decided in the Supreme Court of Massachusetts, Justice Carey uses this language:

"The notes in suit having been made payable in Louisiana, the question of the validity depends upon the law of that state. If they are void by that law, they are void everywhere."

Stevenson vs. Payne, 109 Mass., 378.

Mr. Storey in his "Conflict of Law" (Redfield's edition), section 242, uses this language:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in anothr country, for, as we shall presently see, in the latter case the law of the place is to govern. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere."

Section 253: The same rule applies vice versa to the validity of contracts; if void or illegal by the law of the place of contract they are generally void and illegal everywhere."

VI.

TEH POINT THAT THE STATUTE OF NEW YORK APPLIES ONLY TO ONE DEFAULT AND NOT TO SUCCESSIVE DEFAULTS, ON THE GROUND THAT THE COMPANY IS A MUTUAL IT MUST BE DECIDED AGAINST PETITIONER BY THIS COURT IN THE COHEN CASE. IN FACT, IT MUST B EDECIDED AGAINST PETITIONER ON REASON.

It is true that in the decision in the Phinney case the Court used this language, "but it is a very different question whether the executors of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, threby di-

minishing their interest in their accumulated reserve." That point was before the Court in the Cohen case.

See Cohen brief, p. 30.
See Phinney brief, p. 94.

But the Court disposed of this point in the Cohen case as it did of the other points, saying:

"The primray question in those cases is distinctly and solely presented in this. This notice (the statutory notice) was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover. The question is, therefore, whether the law of New York controls."

We think this effectually ends the contention of plaintiff in error. This must be the law on principle. The statute says no policy hereafter issued or renewed by any life insurance company shall be declared lapsed or void for failure to pay any premium unless the company shall serve a prescribed notice. No one will contend that the legislature of New York had not the power to make the forfeiture of any policy conditioned solely on the service of such notice and provide that the policy should be a continuing one until such notice was served. Surely the legislature of Washington has that power over local and foreign insurance companies if it considered it a wise policy to enact such a law. Yet, if the contention of plaintiff in error is correct, such an act will be unconstitutional and void as against a mutual insurance company. We think a Court would hesitate a long time before declaring such an act unconstitutional. Yet, if such an act is not unconstitutional, the argument of plaintiff in error is not well taken.

Every member of a mutual life insurance company

when he becomes a policy holder enters into an agreement and understanding, if not actual, at least implied, that the corporation itself will make other contracts with other people along the same general line. He consents and agrees in law that the corporation, acting by its officers, shall make valid and existing contracts with such anticipated policy holders. He trusts to the officers of the corporation to make valid and profitable contracts. Such policy holder gets the benefit of contracts thus made. While getting the benefit of contracts so made, he must stand his share of the burden of such contracts. He must share in the losses incident to the business as well as share in the profits. As a policy holder he has a right to insist upon the company enforcing the provisions of a contract in favor of the corporation. As a policy holder he has no right unless the contract be *ultra vires* to ask a Court to ignore the provisions of a new contract favorable to the new policy holder. As a member of the corporation he can ask nothing further than that the corporation live up to the contracts it makes with other policy holders, and demand of each policy holder that they life up to the provisions of the contract. No one will contend that a legislature that grants to a corporation of this kind a charter enabling it to write life insurance might not insert in such charter a provision to the effect that no policy could be forfeited until it served a prescribed notice in a prescribed way. In such case each policy holder contracts with the corporation with the understanding that his policy and any other policy it might write would be subject to the provisions of the charter and would not be forfeitable except by the officers of the corporation, complying with such provision. Every party who contracts with a

corporation of this kind does it with the knowledge and understanding that a legislature may interpose upon such a life insurance corporation, as a condition of forfeiture, the service of such a notice, and that if the legislature chooses to enact such a law no contract will be forfeitable unless notice is served.

No policy holder has a right to demand in such a case that the policy of another member of the association shall be forfeited on any other than the terms so required by such an act. Each policy holder has the protection of such legislation. Each policy holder may claim it and rely upon it, and no policy holder has the right to ask of another policy holder not to ask the protection that such policy holder himself might demand and claim. Take the structly mutual benefit associations, for example, where the trustees or officers are compelled to make assessments to pay death losses. So far as I am aware, in every instance, by the laws or by the nature of the organization, a notice is required to be served on each member. It has never been claimed, so far as I am aware, that a membr loss his policy unless he has first been served with a notice stating the amount of the assessment. No member of such an association has a right to ask that a policy of a member cease until the requisite notice is served, and if the officers of the association fail and neglect to perform their duties, then the association itself must suffer the loss, because the agreement is mutual and based on the agreement and understanding that no one shall lose his membership or his insurance except on the condition of the service of the prescribed notice.

I have never known of a policy holder who was wor-

ried for fear that an insurance company which had issued to him a policy would not forfeit enough of the contracts of his brother policy holders. The suggestion that there might be such a one is something new and novel. I have never heard anyone suggest that a company did not insert in its policy a sufficient number of harsh forfeiture provisions and did not enforce them with sufficient promptness.

The notice law of New York is not harsh nor unusual. Similar laws have been enacted in a number of states to protect the policy holders. Nearly all of the Courts that have been called upon to pass upon such laws have spoken of them with favor. The notice law of New York does not prevent the company from forfeiting a contract on the day stipulated for the premiums to be paid, but provides easy and simple methods of terminating insurance contracts unless the premiums are paid. It is not at all similar to the Stratham case, where each party was prevented from living up to the terms of the contract by war. In that case no question of notice was involved, but I feel certain that if the life insurance company interested in that case had been required to serve a notice of forfeiture as a condition of forfeiture of the contract, and then, the war intervening, not being able to serve their notice, they would have been compelled to suffer instead of the policy holders, but the contract in those cases required the insured to pay the premiums on the day served, and if not paid on that day the policy was to be forfeited. The Court held that, while it was true they could not pay, still the burden was upon them to pay, and the contract ceased. Again, in this case the corporation is defending. No policy holder has intervened and asked to be protected in this

case, but the issue is here between the corporation itself and the plaintiff. The corporation is defending as any other corporation would defend. The policy holders themselves are making no defense nor asking to intervene in their own behalf.

VII.

THE CONTENTION THAT RECOVERY IN THIS CASE IS IN THE NATURE OF A SPECIFIC PERFORMANCE BY THE PARTIES WHO HAVE FAILED TO MEET THE OBLIGATION OF THE CONTRACT, HAS BEEN DECIDED ADVERSELY TO PETITIONER BY EVERY COURT WHICH HAS PASSED UPON THAT QUESTION.

The same contention was made when the case was here before. The point being a common one in all the cases before the Court on the former hearing, a decision in favor of petitioner on this point alone would have ended all the cases. It is not referred to nor mentioned in any o fthe decisions of that cluster of cases heretofore mentioned. It has been decided adversely to petitioner in a dozen decisions in the different state Supreme Courts. The Appellate Court of New York was the first Court to pass upon this question. The pleadings here are identical with the pleadings in that case. That Court said:

"It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action the premium that was payable on the 24th day of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured, or her as-

signee, except to present to the defendant the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life, by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid. Carter vs. John Hancock M. Life Ins. Co., *supra*. It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and thus no injustice has been done."

Baxter vs. Ins. Co., 119 N. Y., 450.

In a still later case this decision was upheld by the same Court, in which all the justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and provd non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frace vs. Insurance Co., 136 N. Y., 144, p. 151.
Osborne vs. Ins. Co., 123 Cal., 610.
Ins. Co. vs. Hill, 97 Fed., 263.

It seems to respondents upon authority that its con-

tentions are correct, that no good result could possibly be served by the Court granting this petition for a writ of certiorari. This case has been in litigation for the past eight years. We think we have shown that every question that is raised by the petitioner has been decided by this Court and the lower Court and by many other State Supreme Courts in our favor. The litigation has been a most expensive one to the respondents. Their means have been nearly exhausted in prosecuting this case. If the writ is granted there will necessarily follow an affirmance of the lower Court.

Wherefore, plaintiff prays that this petition for a writ of certiorari be denied.

Respectfully submitted,

STANTON WARBURTON,

Attorney for Respondents.